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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

CHRIS SALE, ACTING COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, *ET AL.*,

*Petitioners,*

*vs.*

HAITIAN CENTERS COUNCIL, INC., *ET AL.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## RESPONDENTS' OPPOSITION

HAROLD HONGJU KOH
Lowenstein International Human Rights Clinic
127 Wall Street
New Haven, Connecticut 06520
(203) 432-4932

LUCAS GUTTENTAG
JUDY RABINOVITZ
Immigrants' Rights Project
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 944-9800

ROBERT RUBIN
IGNATIUS BAU
National Refugee Rights Project
Lawyers' Committee for Civil Rights of the Bay Area
301 Mission Street
San Francisco, California 94105
(415) 543-9444

*MICHAEL D. RATNER
SUZANNE SHENDE
Center for Constitutional Rights
666 Broadway
New York, New York 10012
(212) 614-6464

JOSEPH TRINGALI
SUSAN SAWYER
Simpson Thacher & Bartlett
425 Lexington Avenue
New York, New York 10017
(212) 455-2000

*Attorneys for Respondents*
**Counsel of Record*

3911

## QUESTIONS PRESENTED

1. Whether the lower courts abused their discretion by finding sufficiently serious questions going to the merits that the Fifth Amendment Due Process Clause applies to non-accused, non-hostile, "screened-in" Haitian aliens being held in custody on territory within the exclusive jurisdiction and control of the United States in connection with their efforts to avoid return to Haiti where they face political persecution and even death.

2. Whether the courts below abused their discretion by finding that the Eleventh Circuit's ruling barring "screened-out" Haitians from challenging initial INS screening procedures did not collaterally estop "screened-in" Haitians from challenging a new government practice of reinterviewing "screened-in" Haitians on Guantanamo without legal counsel and forcibly repatriating them to Haiti.

## Table of Contents


Page

QUESTIONS PRESENTED . . . . . i

TABLE OF AUTHORITIES . . . . . iv

SUMMARY OF ARGUMENT . . . . . 1

STATEMENT . . . . . 3

I. Background . . . . . 3
II. *HRC v. Baker* . . . . . 4
III. *HCC I* . . . . . 6
IV. *HCC II* . . . . . 8
V. District court proceedings since the close of the record before the court of appeals . . . . . 9

REASONS FOR DENYING THE WRIT . . . . . 10

I. This Court should not review a fact-specific, nonfinal order that maintains the *status quo* when review will not decide all of the issues between the parties, particularly when a fuller record is now being made at trial. . . . . 10

II. The district court did not abuse its discretion by issuing the nonfinal order here, and the court of appeals properly affirmed that order as modified. . . . . 16

Page

III. The courts below did not abuse their discretion by holding that the Eleventh Circuit's ruling barring "screened-out" Haitians from challenging initial INS screening procedures did not collaterally estop "screened-in" Haitians from challenging a new government practice of reinterviewing "screened-in" Haitians on Guantanamo without legal counsel and forcibly repatriating them to Haiti. . . . . 23

IV. Alternatively, the petition should be held and disposed of in light of no. 92-344, *Sale v. Haitian Centers Council, Inc.*; under no scenario would the remedy of summary reversal be appropriate. . . . . 27

CONCLUSION . . . . . 30

## Table of Authorities

**Page(s)**

**Cases**

*American Constr. Co. v. Jacksonville, T. & K. R. Co.*, 148 U.S. 373 (1893) . . . . . 11

*Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987) . . . . . 22

*Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288 (1936) . . . . . 15, 30

*Azzouka v. Sava*, 777 F.2d 68 (2d Cir. 1985) . . . . . 19

*Balzac v. Porto Rico*, 258 U.S. 298 (1922) . . . . . 19

*Brown v. Choate*, 411 U.S. 452 (1973) . . . . . 16

*De Lima v. Bidwell*, 182 U.S. 1 (1901) . . . . . 19

*Dorr v. United States*, 195 U.S. 138 (1904) . . . . . 19

*Downes v. Bidwell*, 182 U.S. 244 (1901) . . . . . 19

*Eaton v. City of Tulsa*, 415 U.S. 647 . . . . . 29, 30

*Frisby v. Schultz*, 487 U.S. 474 (1988) . . . . . 14

*Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987) . . . . . 16

**Page(s)**

*Haitian Refugee Center v. Baker*, 789 F. Supp. 1552 (S.D. Fla. 1991), *injunction dissolved*, 949 F.2d 1109 (11th Cir.), *cert. denied*, 112 S. Ct. 1245 (1992) . . . . . 26

*Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 . . . . . 10

*Hansberry v. Lee*, 311 U.S. 32 (1940) . . . . . 25

*House v. Mayo*, 324 U.S. 42 (1945) . . . . . 15

*Johnson v. Eisentrager*, 339 U.S. 763 (1950) . . . . . 18, 21

*Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960) . . . . . 21

*Landon v. Plasencia*, 459 U.S. 21 (1982) . . . . . 20

*McNary v. Haitian Centers Council, Inc.*, 112 S. Ct. 1714 (1992) . . . . . 13

*Montana v. Hall*, 481 U.S. 401 (1987) . . . . . 29

*Montana v. United States*, 440 U.S. 147 (1979) . . . . . 25, 27

*Nicosia v. Wall*, 442 F.2d 1005 (5th Cir. 1971) . . . . . 19

*Nishimura Ekiu v. United States*, 142 U.S. 651 (1892) . . . . . 20

**Page(s)**

*Parklane Hosiery Co. v. Shore*, 439 U.S. 322 & n.7 (1979) . . . . . 24

*Pennsylvania v. Mimms*, 434 U.S. 106 (1977) . . . . . 29

*Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977) . . . . . 19

*Reid v. Covert*, 354 U.S. 1, 53 (1957) . . . . . 21, 22

*Sale v. Haitian Centers Council, Inc.*, No. 92-344 (U.S. argued Mar. 2, 1993) . . . . . 3, 10, 27, 30

*Schweiker v. Hansen*, 450 U.S. 785 (1981) . . . . . 29

*Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) . . . . . 20

*Stone v. Graham*, 449 U.S. 39 (1980) . . . . . 29

*Straight v. Wainwright*, 476 U.S. 1132 (1985) . . . . . 28

*United States v. Caltex, Inc.*, 344 U.S. 149 (1952) . . . . . 22

*United States v. General Motors Corp.*, 323 U.S. 373 (1945) . . . . . 14

*United States v. Hollywood Motor Car Co.*, 458 U.S. 263 (1982) . . . . . 29

*United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. for Berlin 1979) . . . . . 19

**Page(s)**

*United States v. Verdugo-Urquidez*,
494 U.S. 259 (1990) . . . . . 14, 17, 21-23

*Whalen v. Roe*, 423 U.S. 1313, (1974) . . . . . 13

*Wyrick v. Fields*, 459 U.S. 42 (1982) . . . . . 30

*Yiu Sing Chun v. Sava*, 708 F.2d 869
(2d Cir. 1983) . . . . . 19

**Constitution, Treaty, Statutes**

Executive Order No. 12,807,
57 Fed. Reg. 23,133 (1992) . . . . . 3, 8

Fed. R. Civ. P. 15(b) . . . . . 7

Immigration and Nationality Act § 243(h),
8 U.S.C. § 1253(h) . . . . . 7, 8

United Nations Convention Relating to the
Status of Refugees, July 28, 1951,
19 U.S.T. 6259, 189 U.N.T.S. 150
[Article 33, 19 U.S.T. at 6275] . . . . . 8, 28

U.S. Const. amend. I . . . . . 6

U.S. Const. amend. IV . . . . . 21, 22

U.S. Const. amend. V (Due Process Clause) . . . . . *passim*

Page(s)

**Other Authorities**

Restatement (Second) of Judgments
§ 28(5) (1982) . . . . . 27

11 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2947
(1992 Supp.) . . . . . 14

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## RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## SUMMARY OF ARGUMENT

Respondents Haitian Centers Council, Inc., *et al.* oppose the petition for a writ of certiorari because the decision below was correct and warrants no further review, particularly in its current interlocutory posture. Petitioners seek review of a nonfinal order, decided on narrow fact-specific grounds, that presents no extraordinary issue, upon which the circuits are not divided, and that simply maintains the *status quo* pending a trial that will be completed before this Court can dispose of this petition. Petitioners concede that the district court's preliminary injunction, as modified on appeal, "does not require petitioners to grant respondent [Haitian Service] organizations immediate access to Guantanamo and affects for now only the several hundred screened-in Haitians at Guantanamo . . . who . . . await further interviews there." Pet. at

12.[1] Nor does the Second Circuit's decision require or even concern the entry into the United States of the 252 "screened-in" Haitians[2] who have been forcibly held in custody behind barbed wire on Guantanamo for as long as fifteen months, many of whom already have been found to have well-founded fears of political persecution. Rather, pending trial on the merits, petitioners are enjoined merely from interviewing respondent Haitians to determine whether to repatriate them to Haiti unless respondents are represented by attorneys during those interviews.

Although the Second Circuit rendered its decision ten months ago, petitioners have not sought a stay in either the Second Circuit or this Court. On March 8, 1993, a full trial on the issues raised in the petition, as well as other dispositive issues, began in the district court, and the factual record has now been dramatically expanded. The trial is scheduled to end on March 18. If respondents should win at trial and again on appeal, this Court can review that judgment on a fully developed record, thereby avoiding the needless review and piecemeal litigation that granting this petition would engender.

Furthermore, the lower courts were correct in finding sufficiently serious questions going to the merits that the Fifth Amendment Due Process Clause applies to "screened-in" Haitian aliens being held in custody on territory within the exclusive jurisdiction and control of the United States in connection with their efforts to avoid return to Haiti,[3] where they face political persecution.

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1. "Pet." refers to the petition for a writ of certiorari in No. 92-528. "Pet. App." refers to the appendix to the petition in No. 92-344. "J.A." refers to the joint appendix in No. 92-344.

2. This is an approximate number. A small number of Haitians have been paroled into the United States from Guantanamo despite petitioners' general ban, because they either have proved HIV-negative and willing to separate from the HIV-positive members of their family or because they have required medical treatment that is unavailable on Guantanamo.

Even if the Court were inclined to grant review, this petition should be held and disposed of in light of the Court's ruling in *Sale v. Haitian Centers Council*, No. 92-344 (*HCC II*) (argued March 2, 1993). Petitioners concede "much commonality among the issues raised" in this petition and those to be decided in *HCC II*, Pet. at 28, thus rendering their own request for summary reversal completely inappropriate. Summary reversal is granted only in the most egregious cases and never when a related case is under plenary review. Summary reversal has no place where, as here, the decision below was correct, the law is not well-settled, and vital disputed facts remain to be decided at the trial.

## STATEMENT

### I. Background

This case concerns 252 "screened-in" Haitian refugees who have been held in petitioners' custody behind barbed wire for as long as fifteen months in a detention camp at the Guantanamo Naval Base. They fled Haiti in the period following the September 30, 1991 coup which ousted President Jean-Bertrand Aristide and prior to President Bush's May 24, 1992 issuance of Executive Order No. 12,807, 57 Fed. Reg. 23,133 (1992) ("Kennebunkport Order"), Pet. App. at 260a-263a (directing lower government officials to summarily repatriate all Haitians without any process or screening). Under the program in effect at the time respondents were interdicted, Haitians were interviewed, and those found to have a credible political asylum claim were "screened in" and brought to the United States where they could apply for asylum. Those found not to have a credible fear of political persecution were "screened out" and repatriated to Haiti.[3]

The Haitians involved in this case were "screened-in," but not brought to the United States. Pet. App. at 111a-14a; Pet. at 3. Instead, because respondents allegedly have a communicable

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3. This litigation preceded respondents' challenge to the Kennebunkport Order, *HCC II*, upon which this Court heard oral argument on March 2, 1993.

disease, petitioners required Haitian respondents to pass a second uncounseled interview in order to avoid return to Haiti. In April, 1992, the district court entered a preliminary injunction to ensure that such uncounseled second interviews would not occur pending a trial on the merits.

**II. *HRC v. Baker***

Haitians began fleeing political reprisals that followed the September 30, 1991 military coup that overthrew the government of President Aristide, the first democratically elected government of Haiti. Petitioners continued their long-standing policy of "screening out" and returning to Haiti interdicted Haitians who lacked credible fears of persecution, but began housing "screened-in" Haitians at the United States Naval Base at Guantanamo Bay pending their transfer to the United States. In November 1991, the Haitian Refugee Center ("HRC") brought a suit in the Southern District of Florida challenging the adequacy of the initial screening procedures. Plaintiffs included HRC itself and a class represented by fifteen named plaintiffs, all of whom had been "screened-out." *HRC*, Second Amended Compl. ¶¶ 7, 9-23, J.A. at 96, 97-104.

At that time, only Haitians who had been "screened-out" in the initial interview process were at risk of being forcibly returned to Haiti as a consequence of faulty INS screening procedures. Thus, the *HRC* class included only "screened-out" Haitians, *i.e.*, those persons who had suffered harm because of the alleged inadequacies in the initial screening.[4] To halt petitioners' conduct, the district

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4. The fifteen named plaintiffs in *HRC* moved to certify a class consisting of all Haitian aliens who are currently detained or who in the future will be detained on U.S. Coast Guard cutters or at Guantanamo Naval base who were interdicted on the seas pursuant to the United States Interdiction Program and who are being denied First Amendment and procedural rights. *HRC* Class Cert. Motion, J.A. at 119. Their supporting memorandum made clear that

> [t]he individual plaintiffs . . . were intercepted by the United States Coast Guard pursuant to a 'program of interdiction' that permits interception and repatriation of undocumented

(continued...)

court issued several injunctions, which the Eleventh Circuit reversed in two separate rulings. Pet. App. at 171a-189a; *id.* at 190a-252a. In opposing certiorari in *HRC*, the Solicitor General specifically represented to this Court that

> Under current practice [followed for more than a decade], *any [screened-in] aliens who satisfy the threshold standard are to be brought to the United States so that they can file an application for asylum* under section 208 (a) of the [INA]. . . . These "screened in" individuals then have the opportunity for a full adjudicatory determination of whether they satisfy the statutory standard of being a "refugee" and otherwise qualify for the discretionary relief of asylum.

J.A. at 252 (emphasis added). Yet only five days after this Court denied certiorari in *HRC*, petitioners changed that practice, began reinterviewing certain of the "screened-in" Haitians on Guantanamo without lawyers, and moved to repatriate those "screened-in" Haitians who "failed" the new uncounseled procedures. This new practice was embodied in a February 29, 1992 memorandum from INS General Counsel Grover Joseph Rees, III, which mandated that "screened-in" Haitians with a communicable disease be given a second interview to determine if they have a "well founded fear of persecution on account of . . . political opinion." Pet. App. at 82. The memorandum stated that the interviews were to be "identical" or as "nearly so as possible" to asylum interviews in the United

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4.(...continued)

> aliens. . . . They have all been 'screened out' . . . . Effectively, as a result, each of these plaintiffs would be forcibly returned to Haiti . . . were it not for the Court's order.

*HRC* Class Cert. Mem., J.A. at 126-127. Only Haitians who had been "screened-out" in the initial interview process were at risk of being forcibly returned to Haiti. The *HRC* defendants did not oppose the motion or respond to the Memorandum. Accordingly, the district court certified the class without a hearing or opinion. *HRC* Order of December 3, 1991. J.A. at 89.

States. Pet. App. at 83. However, unlike asylum applicants in the United States, "screened-in" Haitians subject to a second interview were denied all the procedural protections that ordinarily attend asylum processing in the United States, including access to an attorney. These events gave rise to the instant lawsuit.

### III. *HCC I*

Respondents brought this action in March, 1992, in the Eastern District of New York (Johnson, J.) on behalf, *inter alia*, of "[a]ll Haitian citizens who have been or will be screened-in," *see* Plaintiffs' Notice of Motion for Provisional Class Cert., J.A. at 281, challenging petitioners' changed practice.[5] Respondents sought a preliminary order that no "screened-in" Haitian on Guantanamo could be reinterviewed or repatriated without counsel, pending a determination at trial of the new policy's legality. The complaint alleged seven different violations of law, four of which are currently being tried before the district court. The court is also hearing two additional claims not raised in the original complaint.[6]

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5. Other plaintiffs included three "Haitian Service Organizations," legal and advocacy groups that sought to provide counsel and assistance to the "screened-in" Haitians being detained at Guantanamo.

6. The following six issues are currently being litigated in the district court:

(1) the content-based denial of plaintiff Haitian Service Organizations' First Amendment rights to communicate with the "screened-in" Haitians held on Guantanamo;

(2) the denial of the "screened-in" Haitians' constitutional rights to obtain and communicate with counsel in the newly implemented rescreening process on Guantanamo;

(3) petitioners' arbitrary and capricious action that was not in accordance with law in connection with, *inter alia*, petitioners' intimidating and coercing the screened-in Haitians and wrongfully denying their individual asylum claims;

(4) the denial of the "screened-in" Haitians' equal protection rights by creating a separate and unequal asylum process for Haitians only;

(continued...)

Thus, the right to counsel under the Due Process Clause—the only one of plaintiffs' claims that would be before this Court if it were to grant this petition—is only a very small piece of a much larger case.

On March 27, 1992, the district court issued a 23-page opinion granting a temporary restraining order requiring that the named "screened-in" Haitian plaintiffs be given immediate access to their lawyers and enjoining both uncounseled reinterviews on Guantanamo and repatriation of uncounseled class members. Pet. App. at 125a. On April 1, 1992, the district court conducted a full-day preliminary injunction hearing at which the parties offered extensive written evidence and oral testimony. On April 6, 1992, the court granted a preliminary injunction in a lengthy opinion, which contained detailed findings of fact, conclusions of law, and conditional certification of the "screened-in" Haitians on Guantanamo as a plaintiff class. Pet. App. at 142a.

The court found that "the balance [of hardships] tips decidedly in favor of Plaintiffs" and "that irreparable harm is likely to result if this preliminary injunction were [not] issued." Pet. App at 152a, 161a (*sic*). Specifically, the court determined that "[r]epatriated Haitians face political persecution and even death on their return," Pet. App. at 148a, and that there were serious questions going to the merits of respondents' First and Fifth Amendment claims, Pet. App. at 155a, 157a. The preliminary relief that Judge Johnson ordered—preventing the allegedly unlawful repatriation of screened-

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6.(...continued)

(5) the denial of due process rights by detaining "screened-in" Haitians indefinitely; and,

(6) the denial of due process rights by confining "screened-in" Haitians in inherently unhealthful and life-threatening conditions.

Claims One through Four were contained in the complaint. J.A. at 31-35. The district court ruled from the bench on March 8, 1993 that pursuant to Fed. R. Civ. P. 15(b) Claims Five and Six also were to be considered at trial. In a previous ruling, the court postponed to a later trial respondents' challenge to the policy of summary return under 8 U.S.C. § 1253(h).

in Haitians and preventing respondent advocacy groups' First Amendment rights from being extinguished—was designed to preserve the *status quo* until the full case could be decided after discovery, on a developed record.

The Second Circuit affirmed, with modifications, the lower court's grant of a preliminary injunction. Pet. App. at 73a. However, the Second Circuit only enjoined petitioners from reinterviewing or repatriating screened-in Haitians who had not had an opportunity to consult with counsel. Unlike the district court, the Court of Appeals did not require petitioners to grant lawyers immediate access to their clients on Guantanamo. Instead, the modified injunction required attorney access only if petitioners elected to subject the "screened-in" Haitians to reinterviews that could result in repatriation to Haiti prior to trial. To minimize hardship to either party, the court specifically directed that the trial be expedited. Pet. App. at 117a.

**IV. *HCC II***

On May 24, 1992, pursuant to the Kennebunkport Order issued by President Bush, petitioners dispensed with the legal obligations they had previously recognized not to return aliens to a country where such aliens' life or freedom would be threatened. Pet. App. at 260a. Instead, petitioners Coast Guard and Immigration and Naturalization Service ("INS") instituted a new interdiction program of summary return without screening, forcibly returning *bona fide* refugees, without any process or questioning, to conditions of persecution and death in Haiti.

On March 2, 1993, this Court heard oral argument regarding the Second Circuit's order directing the district court to enjoin petitioners' implementation of the Kennebunkport Order. The Court of Appeals reasoned that the summary return policy violates the plain language of § 243(h) of the Immigration and Nationality Act ("INA") and that the extraterritorial scope of § 243(h) conforms to both the plain language and object and purpose of Article 33.1 of the U.N. Refugee Convention. Pet. App. at 1a-39a.

The 252 "screened-in" Haitians held on Guantanamo, the subject of *HCC I*, were interdicted pursuant to the prior Executive Order. Thus, neither their separate claims concerning their plight on Guantanamo, nor the application of due process protections to aliens in respondents' situation, were before this Court in *HCC II*.

## V. District court proceedings since the close of the record before the court of appeals

Pursuant to the Second Circuit's directive, the district court expedited the trial process in *HCC I*. In that regard, a trial on six separate claims raised by the "screened-in" Haitians held on Guantanamo began on March 8, 1993 and will have concluded before this Court has an opportunity to decide the instant petition.

The trial record will be far more complete than the evidence available to the parties at the time of the preliminary injunction hearing. The Second Circuit's ruling noted the need for a "fuller record" in order to decide the ultimate merits. Pet. App. at 109a. Accordingly, the parties have now taken more than forty depositions and produced thousands of documents to each other. Evidence presented to the district court at trial which was not available at the time of the preliminary injunction establishes, *inter alia*, that: (1) only U.S. criminal and civil laws apply on the Guantanamo Naval Base; (2) the screened-in Haitians have been subjected to indefinite confinement in a camp that the government's own health experts have called a potential public health disaster; and (3) "screened-in" Haitian refugees have not been medically evacuated even though the military doctors on Guantanamo believe they cannot be treated adequately there.

This and other evidence is currently under consideration by the district court, which will very likely make a determination regarding all of plaintiffs' claims before the Court disposes of this petition.

## REASONS FOR DENYING THE WRIT

The writ should be denied because this case is currently on trial before the United States District Court for the Eastern District of New York. Review of the Second Circuit's fact-specific decision would be utterly premature and a waste of this Court's resources. Petitioners identify no issues of special importance warranting review at this stage, nor any issues on which the circuits are divided. Moreover, the decision below was correct, with regard to both the merits and preclusion. Even if the Court were inclined to consider the questions presented here, it should not grant this petition, but rather, should hold and dispose of it after resolution of *Sale v. Haitian Centers Council*, No. 92-344 (*HCC II*) (argued March 2, 1993). Petitioners' request for summary reversal is baseless, given that a related case is under plenary review, the decision below was correct, and the factual record has now been substantially developed at trial.

### I. This Court should not review a fact-specific, nonfinal order that maintains the *status quo* when review will not decide all of the issues between the parties, particularly when a fuller record is now being made at trial.

Petitioners ask this Court to review a preliminary injunction, rendered on a unique set of facts, that retains the *status quo* pending the outcome of a full trial that is currently underway in the U.S. District Court in Brooklyn. This Court reviews interlocutory orders "sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258. For three reasons, this is not such a case.

First, the order upon which review is requested was based upon a unique set of facts that may well never recur.[7] Second, the preliminary injunction, which has been operative for ten months without the petitioners requesting a stay, is not overbroad, but carefully tailored to maintain the *status quo* pending the trial. Third, a plenary trial in this case began on March 8, 1993, and a full factual record has now been developed on both the legal issues relevant to the preliminary injunction as well as upon numerous additional claims that may prove dispositive of the case.

A. The preliminary injunction warrants no review by this Court at an interlocutory stage because it is "neither . . . important in its immediate effect, nor . . . far-reaching in its consequences." *American Constr. Co. v. Jacksonville, T. & K. R. Co.*, 148 U.S. 373, 385-86 (1893). The instant case is highly fact-specific. The courts below made a preliminary determination that a small number of Haitians—who have been interdicted on the high seas, held in U.S. custody on Guantanamo Naval Base over which the U.S. exercises exclusive jurisdiction, "screened-in" under a policy that no longer exists, and determined to have a communicable disease—cannot be repatriated to Haiti while the trial on the merits proceeds, unless they are given access to counsel at their second interview. In affirming a modified preliminary injunction, the Court of Appeals recognized that, based on its "review of the unique facts and circumstances," there were sufficiently serious questions going

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7. Nor need the Court review the order to "secure uniformity of decision." No circuit split exists on the narrow question here: whether the lower courts abused their discretion by finding sufficiently serious questions going to the merits that the Fifth Amendment Due Process Clause applies to non-accused, non-hostile, "screened-in" Haitian aliens being held in custody in territory within the exclusive jurisdiction and control of the United States in connection with their efforts to avoid return to Haiti where they face political persecution and even death. *See* Point II, *infra*.

to the merits that respondent Haitians have due process rights under these unique circumstances. Pet App. at 104a.[8]

B. The preliminary injunction, as modified by the Second Circuit, is narrowly tailored to preserve the *status quo*. Initially, the district court had granted respondent Haitian Service Organizations immediate access to their clients on Guantanamo, but the court of appeals vacated that portion of the order as going beyond the *status quo*. Pet. App. at 116a. The Second Circuit then limited the relief, enjoining petitioners merely from repatriating "screened-in" Haitians who were not first afforded an opportunity to communicate with counsel. Pet. App. at 116a-17a, 85a. Hence, respondent Haitian Service Organizations have no rights under the order to have access to their clients. Under the injunction, petitioners retain the power to repatriate "screened-out" Haitians; to keep "screened-in" Haitians outside the United States; and even to repatriate the "screened-in" Haitians who fail their second interviews, so long as they have had the assistance of counsel.[9]

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8. Petitioners seek to broaden the impact of the preliminary injunction by arguing that it could limit the practical options available to them if they once again decide to interdict *and* screen refugees. Pet. at 27. But this is completely speculative, particularly considering that just a few days ago the government came before this Court in *HCC II* and defended the policy of summary return without screening as lawful. Such policy speculation does not create a reason for this Court to review an interlocutory order in the midst of an ongoing trial. Nor would the order limit petitioners' options except with regard to those relatively few "screened-in" Haitians with a communicable disease whom petitioners seek to subject to an uncounseled second interview. Petitioners' suggestion that the injunction impairs their freedom at sometime in the future to interdict, screen, and then have full refugee determinations on Guantanamo is not only speculative, but flatly inconsistent with their claim that the base cannot even accommodate a few attorneys to process the few respondent Haitians still held here.

9. Respondents falsely claim that "many migrants have expressed a strong preference to return to Haiti" and that the "Second Circuit's decision, however, may well bar such voluntary repatriations." Pet. at 13 n. 9. To the extent that anyone has supposedly expressed such a desire—and petitioners have notified

(continued...)

Nor is the limited injunction causing petitioners irreparable harm that would warrant this Court's short-circuiting an ongoing trial on the merits.[10] Both courts below recognized that the petitioners will suffer no real harm while the preliminary injunction is in place, pending the expedited trial. The Second Circuit recognized that petitioners could only claim vague interference with carrying out their responsibilities. Pet. App. at 116a-117a. Indeed, during the ten months the injunction has been in place, petitioners have not requested a stay. Pet. at 12-13. To the contrary, over that period, petitioners have voluntarily consented to visits to Guantanamo ranging from two days to two weeks by more than forty lawyers, law students, interpreters, and doctors retained by respondents.[11] Accordingly, this Court has no basis now to decide that the preliminary injunction is causing such harm to petitioners as to justify premature review of a nonfinal order.

To grant certiorari and reverse the order below would cause irreparable injury to respondents by returning many of them to Haiti. The Second Circuit expressly affirmed the district court's finding that repatriated Haitians "face political persecution and even death on their return." Pet. App. at 116a. This Court has granted

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**9.**(...continued)
respondents of only three such persons—return to Haiti would not be blocked if respondents' counsel were convinced that the request for voluntary repatriation is genuine. In fact, all screened-in Haitians we know of have declined repatriation after interviews with counsel.

**10.** Petitioners do not argue—as they did to the Second Circuit, Brief for Appellants, No. 92-6090 at 15, that this limited order would dramatically increase the outflow of people from Haiti. Not only is the present order far more limited than the district court order which this Court stayed, *McNary v. Haitian Centers Council, Inc.*, 112 S. Ct. 1714 (1992), but the new Bush-Clinton policy of summary return has undercut any claim of increased outflow.

**11.** In order to successfully seek a stay, petitioners would have had to demonstrate to this Court that they "will suffer irreparable injury if the judgment is not stayed . . . pending appeal." *Whalen v. Roe*, 423 U.S. 1313, 1316 (1974) (Marshall, J.).

review of a nonfinal order only in the rare circumstances where it is "fundamental to the further conduct of the case," *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). Here, by contrast, review and reversal would end the case despite the numerous new facts and legal issues now adduced by the district court, not because the legal issue decided here would dispose of those other issues, but because this Court's review would free petitioners to repatriate respondents to Haiti. Such a result would wholly undercut the most compelling reason for issuing a preliminary injunction in the first place: "to prevent the judicial process from being rendered futile by defendant's action or refusal to act." 11 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2947 (1992 Supp.).

C. It would be highly unusual, if not unprecedented, for this Court to grant certiorari to review a nonfinal order in a case in which a full trial is ongoing, during which new facts and additional legal claims are being raised and decided. Granting review would be particularly premature and unwarranted here, where the facts developed at trial will substantially aid this Court's determination. *Cf. Frisby v. Schultz*, 487 U.S. 474, 479 (1988) (certiorari granted in part when further proceedings not likely to aid Supreme Court consideration).

The Second Circuit has demanded a "fuller record" from the district court, which the trial will provide. Pet. App. at 109a. For example, the Second Circuit's inquiry as to whether "United States civil laws apply to the conduct of all aliens on the base," Pet. App. at 109a, has now been answered affirmatively.[12] Deposition of Lt. Cmdr. Peter Straub (Judge Advocate General's Corps). Likewise, discovery and trial have established that providing counsel to the "screened-in" Haitians is both practicable and critically important

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12. Such a finding might well prove crucial in deciding whether applying the Fifth Amendment would be either "impracticable" or "anomalous" in these circumstances. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring). *See* Point II, *infra*.

to prevent erroneous repatriations. Depositions of Col. Stephen Kinder (former camp commander), Deborah Anker (Lecturer, Harvard Law School), Scott Busby (Guantanamo Asylum Officer), and Grover Joseph Rees, III (INS General Counsel). Given the substantial depositions and trial testimony on these and other issues, it makes no sense, absent immediate harm to respondents, to grant the petition.

Ultimately, this case also may be decided on grounds not raised in the petition. Respondents have raised and proceeded to trial on six legal claims. This petition, however, raises only one of these, the due process claim.[13] *See* Statement, *supra*. One of the claims is statutory—that petitioners' decision to reinterview the "screened-in" Haitians was arbitrary and capricious—and could prove determinative, thereby eliminating the need for this Court to rule on the constitutional grounds presented in the petition. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it'") (citations omitted).

Thus, granting certiorari here would improvidently thrust this Court into piecemeal litigation and spawn unnecessary decisions on constitutional questions. Denying certiorari, by contrast, will "import[] no expression of opinion upon the merits of the case," but will ensure that the lower courts and, if need be, this Court will ultimately review this case on a full, rather than fragmented, record. *House v. Mayo*, 324 U.S. 42, 48 (1945).

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13. Indeed, the petition only concerns one aspect of that claim—the right of the "screened-in" Haitians to access to counsel prior to repatriation to Haiti. It does not concern other aspects of the due process claim that are currently before the district court, including the right to access to counsel for the purpose of challenging conditions of confinement and abuse while so confined.

## II. The district court did not abuse its discretion by issuing the nonfinal order here, and the court of appeals properly affirmed that order as modified.

The court of appeals affirmed a narrowly drawn preliminary injunction tailored to maintain the *status quo*. Pending trial, the Second Circuit enjoined petitioners from repatriating to Haiti "screened-in" Haitians unless they were first provided access to counsel at their second interview. Both lower courts held that respondents would suffer irreparable injury if repatriated to Haiti,[14] and that the balance of hardships tips decidedly in respondents' favor. Pet. App. at 99a-117a; 152a-161a. Petitioners do not contest either conclusion. Even if respondents had not subsequently adduced ample evidence at trial to support these factual findings, under the "two-court rule," this Court should not disturb them. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

Both lower courts further found sufficiently serious questions going to the merits of their claim that respondents—non-accused, non-hostile Haitians, who were interdicted fleeing Haiti, "screened-in," and held in custody on territory subject to exclusive U.S. jurisdiction and control—are entitled to due process in connection with their efforts to avoid erroneous return to persecution in Haiti.[15] In so ruling, the courts below did not abuse their discretion. Thus, certiorari is inappropriate. *Brown v. Choate*, 411 U.S. 452 (1973)

A. Petitioners fundamentally misstate the question presented as whether any and all aliens outside the United States have due

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14. The district court concluded that the "screened-in" Haitians "may face torture [and] death if they lack access to counsel, fail in their bids to receive asylum, and are repatriated to Haiti." Pet. App. at 152a. The Second Circuit specifically affirmed that finding. Pet. App. at 99a, 117a.

15. The Second Circuit found, as did the district court, "that the plaintiffs . . . have met [the likelihood of success] standard as well." Pet. at 117a n.19.

process rights in connection with their attempts to enter the United States. Pet. at 15a-20a. Yet far from mandating due process rights for all aliens outside our borders seeking entry, the preliminary injunction protects a much narrower class of persons who are subject to a distinctively onerous set of government restraints, a much narrower territorial sphere, and a much narrower class of rights. As the Second Circuit carefully explained, its due process holding reaches only: (1) nonaccused, non-hostile Haitians (2) being held in United States custody (3) on territory within the exclusive jurisdiction and control of the United States, (4) who have been "screened-in" as having credible fears of persecution, and (5) who claim the right to due process rights only to avoid a distinctive loss of liberty, *i.e.*, return to Haiti, a country where they face death and persecution. After examining this set of "unique facts—the interdiction of plaintiffs by United States officials, the status of the territory upon which they are detained, and the 'credible' asylum claims they have already been found to possess," the Second Circuit found "that there were serious questions going to the merits" of respondents' due process claims. Pet. App. at 100a. By its terms, that holding has no application to the far broader set of persons, territory, and rights identified by petitioners' sweeping question presented. The Second Circuit carefully specified that "the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory," quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990). Pet. App. at 108a. But the court found the Haitians were not that "limitless class," but an "identifiable group of people . . . who have been detained on territory that is subject to the exclusive control of the United States," have been "screened-in," and have a "reasonable expectation . . . in not being wrongly repatriated" to Haiti where they will suffer political persecution. Pet. App. at 108a, 113a. In our history, no other group of aliens has been similarly screened, while detained in U.S. custody on territory subject to comparable U.S. control, and thus been determined to have such an interest in

non-return. On that fact-specific ground, the Second Circuit held that the respondent "screened-in" Haitians were entitled to "some degree of due process protection" before U.S. officials return them to Haiti. Pet. App. at 114a.

Thus, observing that *Johnson v. Eisentrager*, 339 U.S. 763 (1950), is limited to the claim that the Due Process Clause does not apply to "convicted, enemy aliens" outside the sovereign territory of the United States, the court of appeals found "unanswered" the "serious questions" whether that clause applies to "non-accused, non-hostile aliens held incommunicado on a military base within the *exclusive* control of the United States, namely, Guantanamo Bay." Pet. App. at 107a (emphasis in original).

The court of appeals coupled this ruling with a finding that "United States citizens and aliens alike, charged with the commission of crimes on Guantanamo Bay, are prosecuted under United States laws." Pet. App. at 106a. The appeals court stated that a full record might demonstrate that "United States civil laws apply to the conduct of all aliens on the base," Pet. App. at 109a, a fact that respondents have now confirmed at trial. Thus, the court held there was "no principled basis for concluding that the 'screened in' plaintiffs detained at the base would have fewer substantive rights than these other aliens." Pet. App. at 109a.

Similarly, the court of appeals noted that the Fifth Amendment, which protects fundamental constitutional rights, "does not suggest" that it applies "only to areas fitting a circumscribed definition of the United States." Pet. App. at 107a. The Second Circuit pointed to the unique U.S. agreement with Cuba regarding Guantanamo, which states that "the United States shall exercise complete jurisdiction and control over and within said areas." Pet. App. at 105a. In comparable situations, such as the former Panama Canal Zone, the Trust Territory of the Pacific Islands, and the former American sector in Berlin, the courts have held fundamental

rights applicable to both aliens and citizens under the rationale of the *Insular Cases*.[16]

Finally, the court of appeals held that the Due Process Clause applies to "screened-in" Haitians on Guantanamo *because* their screened-in status recognizes their liberty interest in non-return. As the Second Circuit found, once the Haitians have been "screened-in," there is an alteration in their "fundamental legal and human rights status . . . vis-a-vis the United States government," implicating "the Agreement between the United States and Haiti, the Refugee Act of 1980, and the Protocol, to which we are a signatory," Pet. App. at 113a, all of which forbid the forcible return of refugees to conditions of persecution. These instruments impose a legal duty not to return persons who fear political persecution in their homeland, which in turn creates a liberty interest of which an individual cannot be divested without due process of law. *See Yiu Sing Chun v. Sava*, 708 F.2d 869, 877 (2d Cir. 1983); *Azzouka v. Sava*, 777 F.2d 68 (2d Cir. 1985). By screening respondents in, the Second Circuit concluded, petitioners have altered their status, which means "that the process thereafter employed by the United States with respect to determining the aliens' 'refugee' status should accord with some degree of due process protection." Pet. App. at 113a-114a.

Having found the Due Process Clause applicable "based upon the unique facts and circumstances of this case," Pet. App. at 114a, the court of appeals appropriately concluded that "[p]ermitting access to attorneys is a reasonable method to insure that the 'screened-in' plaintiffs are not wrongly repatriated" to a country

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16. *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Dorr v. United States*, 195 U.S. 138 (1904); *Balzac v. Porto Rico*, 258 U.S. 298 (1922). *See generally Nicosia v. Wall*, 442 F.2d 1005 (5th Cir. 1971) (government concedes that U.S. obligation of non-return under the Protocol Relating to the Status of Refugees applies in the Canal Zone); *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977) (fundamental constitutional rights extend to Trust Territory of the Pacific Islands); *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. for Berlin 1979) (same for American sector in Berlin).

where they have been found to fear persecution. *Id.* At both the preliminary relief and trial stages of this case, respondents have demonstrated that counsel is essential to the process of guaranteeing that such wrongful returns do not occur.[17]

B. Against the Second Circuit's due process determination, petitioners claim, first, that aliens who are seeking admission to the United States have no rights under the Due Process Clause, Pet. at 14-19, and, second, that no constitutional provision ever protects unadmitted aliens outside the country. Pet. at 16.

Even if petitioners' first claim were true, it would have no bearing on this petition. Petitioners claim incorrectly that the courts below found that the "screened-in" Haitians have due process rights "in connection with their applications for admission." Pet. at 16.[18] Rather, the injunction affirmed by the Second Circuit merely protects respondents from being "wrongly repatriated to a country in which they have already been found by our government to have a credible fear of being persecuted." Pet. App. at 114a. The order does not require counseling with regard to questions of entry, only that "screened-in" Haitians have access to counsel before they are repatriated to Haiti from Guantanamo.

The distinction between entry and return also renders irrelevant the cases petitioners cite to demonstrate that aliens seeking to *enter* the country lack due process rights.[19] The injunction at issue here

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**17.** The district court found, and the Second Circuit affirmed, that "the presence of attorneys during an asylum interview on Guantanamo would be useful, feasible, and would not interfere with the interview process." Pet. App. at 116a n. 17. The courts further found that the plaintiffs "may face torture [and] death if they lack access to counsel." Pet. App. at 99a.

**18.** *See also* Pet. at 14, 16, 17, 19.

**19.** The cases relied upon by petitioners, Pet. 15-16, such as *Landon v. Plasencia*, 459 U.S. 21 (1982); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); and *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892), all concern claims of constitutional rights regarding admission. Hence, they cast no doubt upon the liberty interest in non-return being asserted by respondents.

is not based on any Haitian's liberty interest in gaining entry to the United States. The liberty interest, which the courts below found to implicate the Due Process Clause, lies solely in avoiding forced return to the persecution from which they were fleeing.

Petitioners secondly rely on *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), which held the Fourth Amendment inapplicable to warrantless searches of an alien's residence outside U.S. territory, to argue that the Fifth Amendment similarly has no application of any kind to unadmitted aliens. Yet *Verdugo* cannot be read so broadly. The *Verdugo* majority's only comment on the Fifth Amendment was its reference, 494 U.S. at 269, in *dicta*, to *Johnson v. Eisentrager*, 339 U.S. 763 (1950), which involved the rights of enemy aliens in wartime on foreign soil.[20] As we have noted, respondents here are not enemy aliens, but rather, "screened-in" aliens whom petitioners themselves have determined to have credible fears of persecution if returned to Haiti. Nor are they detained exclusively on foreign soil, but at Guantanamo Bay, a unique enclave under exclusive U.S. jurisdiction, where the only law is United States law. Finally, this is manifestly not a wartime situation. Respondents' decision to flee their persecutors is neither a hostile nor a criminal act, but rather, an exercise of their universally recognized human rights.

Chief Justice Rehnquist's opinion in *Verdugo-Urquidez* placed particular emphasis on the Fourth Amendment's reference to a right "of the people," a phrase he construed to require some connection with the United States. 494 U.S. at 264-65. The Fifth Amendment,

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**20.** To the extent *Eisentrager* stands for a geographically restricted approach to the Bill of Rights, it was repudiated in *Reid v. Covert*, 354 U.S. 1, 53, 75 (1957) and *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960). In his concurrence in *Reid*, Justice Harlan assessed the "particular circumstances of [the] particular case," to determine extraterritorial application of the Constitution. 354 U.S. at 75. Justice Harlan's particularized approach was adopted by Justice Kennedy's concurrence in *Verdugo-Urquidez*, 494 U.S. at 275-78, and used by the Second Circuit in analyzing the rights of respondents, Pet. App. at 104a-09a.

by contrast, protects "persons," a term that encompasses a more expansive class than those whom the Chief Justice believed were protected by the Fourth Amendment. Justice Kennedy's decisive concurring opinion applied the approach of Justice Harlan in *Reid v. Covert*, 354 U.S. 1, 75 (1957) (Harlan, J., concurring in the result), arguing that the extraterritorial application of the Bill of Rights should be determined by a contextual case-by-case analysis to determine whether adherence to a specific constitutional guarantee would be "impracticable and anomalous." 494 U.S. at 277-78 (Kennedy, J., concurring).

Thus, *Verdugo*'s narrow holding—the ground actually supported by a five-member majority of the Court—is that the government can rebut the application of a constitutional provision to the acts of the U.S. government outside U.S. territory by demonstrating that adherence to that provision in a particular circumstance would be "impracticable and anomalous." 494 U.S. at 278.[21] In this case, it would be anomalous *not* to extend the Due Process Clause to respondents who are non-hostile, "screened-in" aliens who have been held for over a year in U.S custody in territory subject to the exclusive jurisdiction and control of the United States.[22] As the Second Circuit concluded,

> applying the Fifth Amendment would not appear to be either "impracticable" or "anomalous" since the United States has exclusive control over Guantanamo Bay, and given the undisputed applicability of federal criminal laws to incidents that occur there and the apparent familiarity of the governmental personnel at the base with the

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**21.** Applying Justice Harlan's analysis, Justice Kennedy concluded that it would be impracticable or anomalous to apply the fourth amendment's warrant clause to the search of a nonresident alien's home located abroad. 494 U.S. at 278.

**22.** This Court has recognized Fifth and Fourteenth Amendment due process protections for aliens on foreign soil. *See, e.g., Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 108 (1987); *United States v. Caltex, Inc.*, 344 U.S. 149 (1952).

> guarantees of due process, fundamental fairness and humane treatment that this country purports to afford to all persons.

Pet. App. at 108a-09a.[23] Given this straightforward, fact-bound application of *Verdugo*'s holding, the court of appeals did not abuse its discretion by determining that respondents presented serious questions going to the merits regarding the application of due process protections to ensure that "screened-in" Haitians are not wrongfully returned to their persecutors.

### III. The courts below did not abuse their discretion by holding that the Eleventh Circuit's ruling barring "screened-out" Haitians from challenging initial INS screening procedures did not collaterally estop "screened-in" Haitians from challenging a new government practice of reinterviewing "screened-in" Haitians on Guantanamo without legal counsel and forcibly repatriating them to Haiti.

Petitioners additionally raise a preclusion argument that was rejected below by six of the seven judges who have considered it:[24] that the doctrine of *collateral estoppel* prohibits adjudication of "screened-in" respondents' Fifth Amendment due process claim. Petitioners nowhere claim that the Second Circuit broke new

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23. As the Second Circuit explained:

> It does not appear to us to be incongruous or overreaching to conclude that the United States Constitution limits the conduct of the United States personnel with respect to officially authorized interactions with aliens brought to and detained by such personnel on a land mass exclusively controlled by the United States.

Pet. App. at 108a.

24. *See* Pet. App. at 149a-152a (Johnson, J.); *id.* at 86a-96a (*HCC I*) (Pierce & Cardamone, JJ.); *id.* at 7a-14a (*HCC II*) (Pratt & Newman, JJ.); *id.* at 40a-41a (*HCC II*) (Newman & Pratt, JJ.). Without questioning the majority's rejection of petitioners' collateral estoppel claim in *HCC I*, Judge Mahoney implicitly accepted it en route to dissenting on the merits. *See id.* at 118a-124a (Mahoney, J.).

ground in collateral estoppel law or that the estoppel ruling below created or exacerbated any circuit split. Nevertheless, they ask this Court to deny respondents their day in court even though: (1) respondents were not parties to Eleventh Circuit's decision in *HRC v. Baker*, because they were "screened-in" at that time and suffered no harm as a result of the screening procedures then in effect; (2) the general due process issue was neither actually litigated nor necessarily determined by the Eleventh Circuit in *Baker*; and (3) the specific legal issues relevant to respondents' due process claim could not have been addressed in *Baker*, because the government had not yet implemented its new rescreening policy for HIV-positive Haitians.

### A. "Screened-in" refugee plaintiffs were not parties to *HRC v. Baker*.

It is settled law that one cannot be bound by a prior judgment unless one was either a party to, or represented by a privy in, the prior action. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 & n.7 (1979). As the courts below have repeatedly held, the "screened-out" plaintiff class certified in *HRC* did not represent the "screened-in" plaintiff class that has been conditionally certified in this case. As such, "screened-in" plaintiffs were not parties to that litigation and so cannot be held to be collaterally estopped by it.

The plaintiff class in *HRC* included only "screened-out" Haitians. The fifteen named plaintiffs "ha[d] all been 'screened out.'" Class Cert. Mem., J.A. 126; Second Amended Compl., J.A. 94-104. According to plaintiffs' definition of the class, the legal issues shared by the named plaintiffs all involved denial of procedural rights during the *initial screening process*. Class Cert. Mem., J.A. 126-27. Each member of the proposed class claimed "deprivation of his/her rights based on virtually identical actions" by the INS. *Id.* at 6. The plaintiff class was thus composed solely of persons who had been harmed by allegedly inadequate initial screening procedures, i.e., the "screened-out" Haitians.

Moreover, the Second Circuit correctly noted that the plaintiff class in *HRC* was improperly overbroad if it included both

"screened-in" and "screened-out" Haitians, because the two groups had interests antagonistic to one another. Pet. App. at 93a-94a. The screened-out Haitians in *HRC* were forcibly repatriated as a result of the initial screening process. Thus, of necessity, they attacked the legitimacy of the initial screening process. In contrast, the "screened-in" Haitians in this case would not have wanted to attack the initial screening process because they benefitted from that process by being screened in.[25]

### B. The due process issue was neither actually litigated before, nor necessarily determined by, the Eleventh Circuit.

Even assuming *arguendo* that the screened-in Haitians were properly included in the plaintiff class certified in *HRC*, respondents' Fifth Amendment due process claim cannot be barred because the *HRC* court never rendered a final ruling on the merits of the Fifth Amendment claim in that case. In order for further adjudication of an issue to be deemed collaterally estopped, the question must have been "actually and necessarily determined by a court of competent jurisdiction" in a prior judgment. *Montana v. United States*, 440 U.S. 147, 153 (1979). The Fifth Amendment cause of action pleaded in *HRC* was not necessarily determined.

The *HRC* complaint mentioned the Fifth Amendment only once, in a list of eleven possible bases for relief. J.A. 117. Aside from this brief mention in the complaint, the litigants ignored the claim and at no point briefed the issue. Nor was the claim ever adjudicated on the merits. In its preliminary injunction order, the district court commented on this claim (and five others) only in passing, stating:

> With respect to plaintiffs' remaining claims . . . *without, of course, adjudicating the claims on the*

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25. "[A] selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires." *Hansberry v. Lee*, 311 U.S. 32, 45 (1940).

> *merits*, we find no substantial likelihood that the rights asserted are judicially enforceable *under the present circumstances*.

*Haitian Refugee Center v. Baker*, 789 F. Supp. 1552, 1574 (S.D. Fla. 1991), *injunction dissolved*, 949 F.2d 1109 (11th Cir.), *cert. denied*, 112 S. Ct. 1245 (1992) (emphasis added). Because the district court subsequently entered the injunction on other grounds, *HRC* plaintiffs did not appeal this ruling. Thus, when the Eleventh Circuit later addressed the district court's comment in dicta, and without citation to any legal authority, Pet. App. at 200a, like the district court, it lacked the benefit of any briefing or argumentation by the Haitians whose rights allegedly had been infringed. Such a casual ruling cannot equitably preclude all other interdicted Haitians from ever raising a due process claim.

### C. Plaintiffs' Fifth Amendment claim differs from that alleged by the *HRC* plaintiffs and only arose after *HRC* was decided

Finally, even assuming *arguendo* that the plaintiff classes were the same and that the Eleventh Circuit actually determined the Fifth Amendment issues raised in *HRC*, respondents' Fifth Amendment claim still would not be collaterally estopped here. The Fifth Amendment claim here arose from changed circumstances post-dating the *HRC* case and raises a different legal issue from that addressed in *HRC*. Because this difference is of constitutional import and the instant claim could not have been brought in *HRC* itself, the Second Circuit could not be barred from adjudicating instant plaintiffs' due process claim.

The *HRC* plaintiffs' suit challenged the sufficiency of the procedures used by the INS in its initial screenings. *See HRC v. Baker*, 789 F. Supp. at 1552. Their claim thus would have posed the question whether the Due Process Clause limits the way the government may screen all non-resident aliens interdicted outside of the territorial United States. In contrast, respondents challenge the INS' policy of subjecting *already "screened-in"* refugees, who have been found to possess credible fears of persecution, to *final*

*de facto asylum adjudications* on Guantanamo without access to counsel or other procedural protections, a policy not announced until five days after this Court denied certiorari in *HRC*. Even after being told by U.S. government officials that they would be taken to the United States, respondents have been detained for more than a year, on territory subject to the United States' exclusive jurisdiction and control, by these same officials. This case thus poses the novel question whether such persons have constitutionally protected liberty interests not otherwise enjoyed by unscreened refugees—interests of which respondents cannot then be deprived except through a constitutionally adequate procedure, one hallmark of which is the right to counsel.

As this Court has stated, "[c]hanges in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues." *Montana v. United States*, 440 U.S. 147, 159 (1979). Moreover, collateral estoppel will not apply if "[t]here is a clear and convincing need for a new determination of the issues. . . (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action." Restatement (Second) of Judgments § 28(5) (1982). The Fifth Amendment claim asserted here simply could not have been raised in the *HRC* litigation because the screened-in Haitians' claim targets a post-*HRC* government practice in a setting raising a different Fifth Amendment issue from that decided in *HRC*. Thus, collateral estoppel can pose no bar to the district court's adjudication of the Fifth Amendment claim.

## IV. Alternatively, the petition should be held and disposed of in light of no. 92-344, *Sale v. Haitian Centers Council, Inc.*; under no scenario would the remedy of summary reversal be appropriate.

A. Petitioners propose that the Court "may wish to consider holding this petition pending" the decision in *Sale v. Haitian Centers Council*, No. 92-344 (argued March 2, 1993), because "there is much commonality among the issues" in the two cases.

Pet. at 28. Petitioners argue in No. 92-344 that Article 33.1 of the U.N. Convention and 8 U.S.C. § 1253(h) are inapplicable to aliens outside the United States and that if the Court agrees, its ruling would undercut the Second Circuit's decision here that the "screened-in" respondents have a "protectable liberty interest." Pet. at 28. We dispute that a decision from this Court in *HCC II* finding Article 33.1 and section 1253(h) somehow inapplicable to Coast Guard interdictions on the high seas would materially affect respondents' due process right to attorneys prior to their repatriation from Guantanamo to Haiti by direct action of the Attorney General. However, it is petitioners who not only request certiorari, but also emphasize the instant petition's relationship to No. 92-344. "A vote to 'hold' is a statement . . . that the disposition of the granted case may have an effect on the merits of the case which is to be held." *Straight v. Wainwright*, 476 U.S. 1132, 1135 (1985) (Brennan, J., dissenting). Thus, even if this Court were inclined to examine the Second Circuit's decision further, it should do no more than hold this petition pending its plenary decision in No. 92-344.

Petitioners further suggest a hold so that the Court may consider, in light of its decision in No. 92-344, their claims that "collateral estoppel bars [the interdictees'] due process claim in light of the *HRC* district court's holding," Pet. 28-29. Although we plainly are not collaterally estopped by *HRC*, *see* point III, *supra*, the issue of collateral estoppel has been briefed and argued in No. 92-344, and the Court's decision there could clarify the issue now raised by petitioners. Rather than hold the petition solely for the collateral estoppel issue, however, the better course still would be to deny certiorari. Should the Court later wish to review the issues in this case, it could do so later, after a full record has been developed in the ongoing trial and the full range of legal issues has been determined at trial.

B. Nor, finally, is there any merit whatsoever in petitioners' arrogant request for summary reversal. Pet. at 22. As petitioners themselves argue, two of the issues they ask this Court to review share "commonality" with those awaiting decision in No. 92-344.

Summary reversals by this Court are strongly disfavored. *See, e.g., Pennsylvania v. Mimms*, 434 U.S. 106, 114 (1977) (Marshall, J., dissenting).[26] This Court has never granted summary reversal when it has *sub judice* matters that will affect the correctness of the very decision whose summary reversal is urged.

In any event, summary reversal is an extraordinary and exceptional disposition reserved "for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly erroneous." *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting). None of these prerequisites has been met here. The fact that some of these very issues are under review by the Court in No. 92-344 proves conclusively that the relevant law is neither settled nor stable.[27] Additional facts relevant to the issuance of a preliminary injunction—*e.g.*, the applicable law on Guantanamo—are under consideration at the ongoing trial in the district court. Petitioners have not cited any decision with which the Second Circuit's ruling, properly

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26. *See also Eaton v. City of Tulsa*, 415 U.S. 647, 707 (Rehnquist, J., dissenting) ("I have no doubt that a majority of this Court would refuse to reverse . . . if it had a full record before it . . . ."); *Montana v. Hall*, 481 U.S. 401, 405 (1987) (Marshall, J., dissenting); *Stone v. Graham*, 449 U.S. 39, 47 (1980) (Rehnquist, J., dissenting) (condemning "cavalier summary reversal, without benefit of oral argument or briefs on the merits"); *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 271-72 (1982) (Blackmun, J., dissenting) (summary reversal "deprives respondents of their 'day in court' in a singularly inappropriate manner," and "demeans the Court and its work and surely tends to lessen the quality of its legal product").

27. Summary reversal is particularly improper "in a case that involves a significant issue not settled by [the Court's] prior decisions." *Wyrick v. Fields*, 459 U.S. 42, 52 (1982) (Marshall, J., dissenting). Summary reversal would also likely involve the Court in reaching the merits of the constitutional due process issue, despite petitioners' claim that the Court should not reach that issue because collateral estoppel bars this litigation. Under the rule in *Ashwander v. Tennessee*, 297 U.S. 288, 323 (1936) (Brandeis, J., concurring), the Court should consider the collateral estoppel issue before addressing the constitutional issue. Accordingly, the Court should hold the petition, pending decision of the collateral estoppel issue in No. 92-344.

understood, clearly conflicts. Finally, far from being clearly erroneous, the lower courts' grant of the preliminary injunction was correct. Particularly when constitutional questions are at stake, summary reversal "should be reserved for palpably clear cases of constitutional error," *Eaton v. City of Tulsa*, 415 U.S. 697, 707 (1974) (Rehnquist, J., dissenting), a test plainly not met here.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. Even if the Court is inclined to consider the questions presented here, it should not grant and reverse summarily, but rather, should hold the petition pending final disposition of *Sale v. Haitian Centers Council, Inc.*, No. 92-344.

Respectfully submitted.


HAROLD HONGJU KOH
Lowenstein International
Human Rights Clinic
127 Wall Street
New Haven, Connecticut 06520
(203) 432-4932

JOSEPH TRINGALI
SUSAN SAWYER
Simpson, Thacher & Bartlett
425 Lexington Avenue
New York, New York 10017
(212) 455-2000

ROBERT RUBIN
IGNATIUS BAU
National Refugee Rights Project
Lawyers' Committee for Civil
Rights of the Bay Area
301 Mission Street
Suite 400
San Francisco, California 94105
(415) 543-9444

*MICHAEL RATNER
SUZANNE SHENDE
Center for Constitutional Rights
666 Broadway, 7th Fl.
New York, New York 10012
(212) 614-6485

LUCAS GUTTENTAG
JUDY RABINOVITZ
Immigrants' Rights Project
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Attorneys for the Respondents

*Counsel of Record

*On the Brief*

J.D. Candidates,
Yale Law School:
Melinda Amiotte
Victoria Clawson
Lisa Daugaard
Margareth Etienne
Carl Goldfarb
Adam Gutride
Laura Ho
Stephen Roos
Veronique Sanchez
W. Todd Thomas
Cecilia Wang
Jonathan Weisglass
Michael Wishnie